82-742

Office - Supreme Court, U.S.
FILED
OCT 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

FOUNDATION FOR THE HANDICAPPED
Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF THE STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

SWEET, DUSSAULT, NEFF &
GIBBS, P.S.
By: WILLIAM L. E. DUSSAULT
Counsel for Petitioner

Office and P.O. Address:
219 East Galer
Seattle, Washington 98102
(206) 324-4300

QUESTIONS PRESENTED

1. Did the Supreme Court of Washington commit error by upholding the notice and appeal provisions of RCW 72.33.670 (1981) as applied to mentally and physically handicapped residents of state institutions who, while not subject to a judicial declaration of incompetency, by statutory requirement and known disability, are incapable of understanding or responding to notice in a manner which satisfies the "notice and opportunity to be heard" requirements of the due process clause of the fourteenth amendment to the United States Constitution?

2. Whether the Supreme Court of Washington committed error in upholding the disparate treatment of identically situated residents of state schools under RCW 72.33.670 (1981) by collecting funds from some residents subject to a guardian of the

estate, but not from other similarly situated residents, based solely on a legislative drafting error and not upon a rational relationship to a legitimate governmental objective, as required by the equal protection clause of the fourteenth amendment to the United States Constitution?

3. By its ruling in Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1976), that RCW 72.33.670 (1981) was unconstitutional as applied to one segment of equally situated individuals and the ruling in the present case that the statute could be applied to another segment of equally situated individuals without constitutional violation, did the Washington Supreme Court violate the equal protection clause of the fourteenth amendment by allowing discretionary differential application of the statute without any rational basis for doing so?

4. If RCW 72.33.670 (1981) is ruled partially inapplicable or unconstitutional under either the due process clause or equal protection clause of the fourteenth amendment, does the statute thus violate RCW 49.60 (1981) by permitting collection of funds based solely upon perceived mental capacity?

LIST OF PARTIES

FOUNDATION FOR THE HANDICAPPED,[1]
Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF WASHINGTON STATE,
Respondent.

---

[1]The Foundation represents the following individual petitioners: GERALD DUNN; STEPHEN MADDOX, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; PEGGY JEAN WIGINTON, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; DONALD WOODWARD, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; THEODORE BROWN, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; LEONA WAKEFIELD, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; GARY JENKINS, by and through his guardian, LINDA DUFFY; and JACK FURLAN, by and through his guardian, ELSIE GRANATA.

In an order on June 12, 1980, the trial court determined that the persons represented by the Foundation for the Handicapped, for which it served as guardian or

limited guardian of the person and/or estate, or representative payee for the purpose of receipt of state or federal benefits and the other named plaintiffs "will fairly and adequately represent the legal rights and best interests of all the present and potential residents of the state residential schools and institutions concerned in this litigation." (R-125.) The trial court certified this case as a class action "insofar as those individuals are concerned . . ." (R-125).

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutory Provisions Involved	3
I. Statement of the Case	3
II. How Federal Questions Were Raised	8
1. Trial Court	8
2. The Supreme Court of Washington	10
Reasons for Granting the Writ	13
I. The Decision of the Supreme Court of Washington Failed to Recognize That By Statutory Definition, the Mentally and Physically Handicapped Residents of State Institutions Are Individually Incapable of Responding to Notice in a Manner Which Satisfies the Procedural Due Process Requirements of the Constitution	13
II. The Decision Below Incorrectly Upholds a Distinction Between Identically Situated Individuals In the Face of Equal Protection Arguments, With the Distinction Caused By Legislative Drafting Error Without Any Rational Basis	22

Page

III. The Supreme Court of Washington Validated an Impermissibly Vague Statute Which Provides no Authority or Guidance for a Method of Service or Opportunity for Hearing for Residents Not Named in the Statutes, Thus Allowing Collection From Such Residents Based Upon the Discretionary Whim of State Officials. 28

IV. If RCW 72.33.670 (1981) Is Invalid On Either Due Process or Equal Protection Grounds, the Statute Violates RCW 49.60.030 (1981), the Washington Anti-Discrimination Law 32

Conclusion 35

Appendices

Appendix A A-1

Appendix B A-21

Appendix C A-59

TABLES OF AUTHORITY

Table of Cases

Buckley v. Valeo, 424 U.S. 1 (1976) 31

Covey v. Town of Somers, 351 U.S. 141 (1956) 16,17,18,21

Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1978). 6,10,21,24,25,passim

Page

Giaccio v. Penn, 382 U.S. 399 (1966). . 31

Goldberg v. Kelley, 397 U.S. 254 (1970) 22

Lovell v. Griffin, 303 U.S. 444 (1938) 30

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). . . . 15

New Orleans v. Dukes, 427 U.S. 297 (1976) 23

Staub v. Baxley, 355 U.S. 313 (1958). . 30

Constitutional Provisions

U.S. Const. amend. I 29

U.S. Const. amend. XIV 8,12

U.S. Const. amend. XIV, § 1 2

Statutes

RCW 11.88 (1981) 4

RCW 49.60 (1981) 11

RCW 49.60.030 (1981). . . 9,10,12,32,passim

RCW 49.60.030(1) (1981) 33,34,35

RCW 49.60.030(2) (1981) 35

RCW 72.33.020 (1981) 3-4,16,18

Page

RCW 72.33.650 (1981) 23-24

RCW 72.33.670 (1981). . . .3,5,6,7,8,passim

28 U.S.C. § 1257(3) 2

Rules and Regulations

Wash. Admin. Code 275-20-080 (1980) 7,9,27

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

FOUNDATION FOR THE HANDICAPPED
Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF THE STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

The petitioner, Foundation for the Handicapped, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Washington entered in this proceeding on July 29, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported in 97 Wn.2d 691, 648 P.2d 884 (1982), and appears in Appendix A.

The opinion of the Superior Court is unreported and appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Washington affirming respondent's summary judgment was filed on July 29, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

RCW 72.33.670 (1981). The statute appears in Appendix C.

STATEMENT OF THE CASE

I. Facts

The individual named petitioners are all class members who either currently reside in one of the five state residential institutions for the retarded ("schools") in the state of Washington or have resided in one of such "schools" for some period of time since July 1, 1967.

To be admitted and remain as a resident, an individual must meet either the mental or physical handicap definitions contained in RCW 72.33.020 (1981):

> Mental handicap is a state of limited development in consequence of which the individual affected is mentally incapable of assuming those responsibilities expected of a socially adequate person such as self-direction, self-support and social participation.

> Physical handicap is a state of physical impairment in consequence of which the individual affected is physically incapable of assuming those responsibilities expected of a socially adequate person, such as self-direction, self-support and social participation.

While all residents must meet one of the above-cited definitions in order to gain admittance to one of the state residential schools, the residents have differing degrees of legal and actual capacity. Washington State has four statutory types and levels of incompetency, disability, and guardianship. See RCW 11.88 (1981). Some members of the petitioner class are subject to a judicial determination of incompetency or disability. Such a determination may result in the appointment of a full or total guardianship of person and/or estate, or the appointment of a limited guardian of persons and/or estate.

Other class members have previously been determined incompetent or disabled by

a court, but have no current guardian as their legal representative. Some have actual physical or mental disabilities, known to the state to be sufficient to justify their residence in a state school with their legal competency or disability having not been determined by any court.

RCW 72.33.670 (1981) provides that residents of all state "schools" are required to pay the State of Washington various charges for the cost of care received as residents. The statute establishes the sole and exclusive mechanism for collection. In brief, RCW 72.33.670 (1981) calls for collection from all residents capable of paying all or a portion of monthly charges. A Notice and Finding of Financial Responsibility is served on the guardian of the resident's estate, or, if none has been appointed, upon the spouse or parents or anyone else acting in a representative capacity and

having possession of property belonging to the resident. No provision is made for service on the individual resident, nor for service on any type of court-appointed representative other than a guardian of the estate.

An appeal from the determination of financial responsibility may be made by the guardian of the resident's estate. If no guardian has been appointed, the appeal may be made by certain individuals listed in the statute (see App. C). If no appeal is taken, the Notice and Finding of Financial Responsibility becomes final. The statute makes no provision for appeal by the resident nor for appeal by any court-appointed personal representative, except for the guardian of the estate.

In Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1978), the Washington State Supreme Court found RCW 72.33.670 (1981) unconstitutional because

it did not provide service to adult residents not subject to legal declaration of incompetency. As a result of the Supreme Court decision, the Department of Social and Health Services (DSHS) amended its rules and adopted Wash. Admin. Code 275-20-080 (1980).

The regulation provided for personal service upon adult residents who had not been subject to a legal declaration of incompetency. No mechanism for determining actual competency for persons without guardians of the estate has ever been established by the state. RCW 72.33.670 (1981) remains unchanged.

The petitioners seek a refunding of $83,000,000.00 collected from residents of state schools since 1967 under the statute.

II. How Federal Questions Were Raised

1. Trial court

The petitioners filed a complaint in the Superior Court of Washington for Thurston County on March 5, 1979, alleging that RCW 72.33.670 (1981) was subject to constitutional deficiencies (R. at 4). The complaint alleged that the statute violated due process of law as guaranteed by the fourteenth amendment of the United States Constitution, by failure to provide service on adult residents not subject to a legal declaration of incompetency (R. at 15).

The petitioners also alleged in the complaint that the equal protection clause of the fourteenth amendment was violated, as similarly situated residents were classified differently based upon a legislative drafting error or omission and not upon a rational relationship to a legitimate state interest (R. at 16). The complaint also

stated that RCW 49.60.030 (1981) was violated by permitting classification upon the basis of mental competency (R. at 13, 14).

Mutual motions for summary judgment were filed. The trial judge upheld the respondent's summary judgment motion in a memorandum opinion filed June 22, 1981 (see App. B). The trial judge held that the adoption of Wash. Admin. Code 275-20-080 (1980) had cured the due process deficiencies in RCW 72.33.670 (1981), although he also held that the statute was unconstitutional as applied to adult residents not subject to a legal declaration of incompetency served prior to 1976 (R. at 306, 307, App. B, pp. 39, 40). He ruled that the equal protection clause was not violated, as the classification involved was ability to pay, not legal competency (R. at 311, 312, App. B, p. A-52).

The trial court did not address the question of violation of RCW 49.60.030 (1981). Judge Baker found equitable grounds to deny recovery to residents who were served improperly, as ruled in Duffy (R. at 15, App. B, pp. 55-56).

2. The Supreme Court of Washington

The petitioners filed notice of appeal to the Supreme Court of Washington on March 31, 1981 (R. at 318). The appeal alleged error by the trial court in failing to determine that RCW 72.33.670 (1981) violated constitutional requirements under the due process clause of the fourteenth amendment (R. at 318). The petitioners also alleged that the trial court erred in ruling the statute constitutional as applied to one group of individuals but not another, based solely upon legislative drafting error (R. at 319). Finally, the petitioners alleged error by the trial

court in permitting differential application of the statute based upon differences involving mental capacity in violation of RCW 49.60 (1981).

The Supreme Court of Washington accepted the appeal. Briefs were submitted and oral argument was presented. The Supreme Court of Washington affirmed the summary judgment for the respondents. In a written opinion, the court ruled that the service provisions of RCW 72.33.670 (1981) complied with procedural due process under the Constitution:

> DSHS personally served those residents who are not subject to a legal disability. In addition, it serves those residents' spouses, parents or other persons acting in a representative capacity and having property in their possession belonging to the residents, and the superintendent of the schools. We conclude that such notice meets the requirements of due process as it is reasonably calculated to apprise the resident of the proceeding affecting him.

(App. A, p. A-13).

The Supreme Court of Washington also held that RCW 72.33.670 (1981) did not violate equal protection of the laws under the fourteenth amendment. The classification in the statute was said to be between adult residents who were legally competent and more severely handicapped or juvenile residents subject to legal incompetency. The court held this classification to be constitutionally permissible:

> Thus, the distinction is premised on the legal competency of the individual and is rationally related to the purpose of the statute, which is to afford each resident with meaningful notice. Such a distinction does not offend the principles of equal protection.

(App. A, p. A-10).

The court rejected the petitioner's contention that the statute violated RCW 49.60.030 (1981). In the court's view, the classification was based not upon mental or physical handicap, but upon:

> [T]he presence or absence of legal incompetency. The incompetency can be based on age, developmental disability, or severe mental deficiency. RCW 11.88.010(1). There has been no discrimination solely "because of" a mental or physical handicap.

(App. A, pp. 10-11).

Finally, the court affirmed the trial court's ruling that funds collected under improper service between 1967-1976 could be retained by the state, due to principles of unjust enrichment (App. A, p. 17).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Supreme Court of Washington Failed to Recognize That By Statutory Definition, the Mentally and Physically Handicapped Residents of State Institutions Are Individually Incapable of Responding to Notice in a Manner Which Satisfies the Procedural Due Process Requirements of the Constitution

The decision of the Supreme Court of Washington blatantly violates the two most basic principles of procedural due process as continuously enunciated by the Supreme Court of the United States. By validating

the procedure established in RCW 72.33.670 (1981), the court has approved a statutory and regulatory system which provides meaningless paper service and no real opportunity for hearing for a significant number of named petitioners whose property has been taken by the state.

The Washington State Supreme Court ruling allows for the service of a printed form notice to a class of persons who the state knows, by statutory definition, are incapable of understanding such notice. While all petitioners may not be fully legally incompetent, no method is provided for determining actual or legal competency. Additional service is provided to other persons, but no legal relationship or responsibility exists between such other persons and the person whose property is taken.

The decision makes a complete mockery of the concept of meaningful notice and

opportunity for hearing. The Supreme Court of the United States has never deviated from the position that an individual must be provided constitutionally valid procedural due process of law before property can be taken from him. Such due process must include "notice reasonably calculated under all the circumstances to apprise intended parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The Supreme Court of the United States has stressed the importance of fitting notice to the "practicalities and peculiarities of the case . . .," (id., at 314). It is against the Mullane requirements that the statutory notice provisions and the Supreme Court of Washington's decision must be judged.

The "practicalities and peculiarities" of this case are the physical and mental handicaps of the residents. The statutory definitions of these terms contained in RCW 72.33.020 (1981) focus on the inability of the residents to assume "those responsibilities expected of the socially adequate person, such as self-direction, self-support and social participation . . ." This language is the same in the statute for both physically and mentally handicapped residents. For notice to be meaningful for such persons, their actual abilities must be evaluated and considered.

The Supreme Court of the United States in Covey v. Town of Somers, 351 U.S. 141 (1956), described the procedural due process necessary in dealing with individuals having questionable mental capacity such as the petitioners. In Covey, the Town of Somers attempted to foreclose a tax lien on an individual known by the town to be an

incompetent, but not subject to a legal declaration of incompetency. The town gave notice by publication, posting and mail. There was no question that the individual had actually received notice.

The Supreme Court reversed lower court decisions upholding the notice and subsequent tax lien foreclosures as proper under the due process clause. The Court reflected that the town had known for "upward of 15 years" that the petitioner was actually incompetent and a person "without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." Covey, at 146. The Court held:

> Notice to a person known to be incompetent and without the protection of a guardian does not measure up to this requirement . . . we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law.

(Covey, at 146-147).

Covey is the standard for judging notice to the petitioners. Receipt of a printed form entitled "Notice" is not the same as receiving meaningful notice satisfactory of due process requirements. The Supreme Court of Washington's decision focuses on Covey-like residents; actual but undeclared incompetents. Yet, the Supreme Court of Washington specifically ruled Covey non-germane, although it is factually indistinguishable. The court reasoned that since some residents were only physically but not mentally handicapped, "the state is not put on notice that every resident is unable to comprehend a notice . . .," (App. A, pp. 12-13).

There are fundamental flaws in this reasoning. First, attention must again be called to RCW 72.33.020 (1981), which contains the definition of capacity for residents. Certainly, one of the responsibilities of a socially adequate person,

whether mentally or physically handicapped, is the ability to respond to notice. But, by the statute's definition, all residents are deemed socially inadequate. The state is on notice by its own statute that residents cannot respond.

Secondly, the petitioners have never contended that all residents are totally incompetent for the purposes of responding to notice. But the state and the Supreme Court of Washington cannot argue that this fact excuses the statutory notice provision at issue. The statute has no procedure for establishing the competency or degree of incompetency of residents to determine those able to respond to notice. How can the state contend residents are capable of understanding and responding if, knowing of the statutory definition, the state has no procedure for determining actual competency?

The fact that some residents might be able to respond to notice without aid is of little solace to residents unable to do so. Certainly, for residents who are actual but undeclared incompetents, the present procedure violates due process. While the state cannot presume the incompetency of residents, in light of its own statutory definition of the population involved, it certainly cannot presume competency, as the Supreme Court of Washington allows.

The Supreme Court of Washington also erroneously held that service on residents' spouses, parents or others acting in a quasi-fiduciary capacity, as outlined in RCW 72.33.670 (1981), coupled with service on the residents, comported with due process (App. A, p. A-13).

Presumably, the court felt that such service was necessary because service on the residents alone would not comply with due process. Such other individuals have

no more legal right to act on behalf of adult residents without the establishment of a legal guardianship than a complete stranger. As the court expressly held in Duffy, supra, the property is under the legal control of the resident only.

In Covey, the Supreme Court ordered a two-step relief, which is also called for in the present case. First, the property that had been taken was to be returned, as it had been taken without due process. Second, the court implied that a guardian must be appointed upon whom proper service could be made. Covey dictates that the money collected pursuant to constitutionally deficient service from residents who are known to be incompetent, even though not subject to a legal declaration of disability, must be returned.

Any further collection should occur only after guardians ad litem have been appointed for residents not subject to a

legal declaration of incompetency. If residents are determined competent to respond to notice, they can be served. If a resident is determined incompetent to respond to notice, a guardian must be appointed to receive notice on his or her behalf.

The above described procedure will not be inexpensive. But financial cost is an irrelevant consideration when dealing with the remedy for a denial of due process of law, as has occurred here. Goldberg v. Kelley, 397 U.S. 254 (1970). The state has denied due process and should not be heard to plead that it cannot pay for its error.

II. The Decision Below Incorrectly Upholds a Distinction Between Identically Situated Individuals in the Face of Equal Protection Arguments, With the Distinction Caused By Legislative Drafting Error Without Any Rational Basis

The Supreme Court of Washington erroneously concluded that allowing collection under RCW 72.33.670 (1981) from

some identically situated residents, but not others, did not violate equal protection of the laws as guaranteed by the fourteenth amendment. The "rational relationship" test for equal protection requires that a classification under a statute "be rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297 (1976). The court ignored the fact that the classification in RCW 72.33.670 (1981) obviously occurred due to a legislative drafting error, and then compounded its mistake by inferring legislative intent which clearly didn't exist.

The intent of the Washington Legislature was explicitly spelled out in RCW 72.33.650 (1981):

> The purpose of RCW 72.33.670 through 72.33.700 is to place the responsibility for cost of care, support and treatment upon those residents of state residential

> schools who possess assets over and above the minimal amount required to be retained for personal use . . .

Clearly, the Legislature intended the "class" under the statute to be all residents able to pay. However, through legislative drafting error, the Legislature failed to provide any notice or opportunity for hearing to adult residents who did not have guardians of their estates. The Supreme Court of Washington correctly ruled in Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1978), that due process required personal service on adult residents not subject to a legal declaration of disability, thus invalidating collections from those individuals under the deficient statute.

After Duffy, collection of funds from any other residents, under RCW 72.33.670 (1981), while not collecting from the persons protected by Duffy, violated equal protection of the laws. Again, the class

intended by the legislative scheme was all residents financially able to pay for care. Those properly served under the statute had to continue paying. Those omitted from service by the drafting error, although also able to pay, were, after Duffy, exempt from collection. Identically situated residents were classified differently due to a legislative mistake, not a "rational relation to a legitimate state interest."

Incredibly, in this case, the Supreme Court of Washington ignores its own holding in Duffy by allowing continued collection, regardless of judicially determined incompetency, under RCW 72.33.670 (1981). The court presumes that the Legislature intended to classify residents based upon legal competency (App. A, p. A-8). The court reasoned that residents competent

to respond to notice should be personally served. However, residents judged legally incompetent should not be served, as they could not respond to notice effectively (App. A, p. A-9).

This is certainly a commendable goal. Unfortunately for the court, the Washington Legislature never stated, implied or intended such a classification. The statute is silent as to service on adult residents who do not have a guardian of the estate. The statute's silence concerning service on such residents is explicitly the basis used by the Washington State Supreme Court in the Duffy case for declaring the service provisions constitutionally defective for persons not declared incompetents (and, presumptively, for all others not having a guardianship of the estate).

The court's ruling in this case upholds as constitutionally valid, service on adult residents not subject to a legal

declaration of incompetency. This apparently overcomes the Duffy determination that the statutory method provided is constitutionally defective. Yet, RCW 72.33.670 (1981) has not subsequently been amended and remains silent as to the "presumed legislative intent" that the court's decision hinges upon.

Even if the statute was amended to provide for personal service on adult residents not subject to both a declaration of incompetency and appointment of a guardianship of the estate, Argument I of this petition still demonstrates the constitutional deficiencies of the present notice procedures allowed by Wash. Admin. Code 275-20-080 (1980). The statute must fall on equal protection grounds, as well as due process grounds.

III. The Supreme Court of Washington Validated an Impermissibly Vague Statute Which Provides no Authority or Guidance for a Method of Service or Opportunity for Hearing for Residents Not Named in the Statute, Thus Allowing Collection From Such Residents Based Upon the Discretionary Whim of State Officials

The Supreme Court of Washington compounded its error in its equal protection analysis by refusing to strike down RCW 72.33.670 (1981) on grounds of vagueness and/or impermissible discretion. The statute speaks only to service upon residents with a guardian of the estate. It is silent as to residents who have guardians of the person, residents found legally incompetent but without guardians of the person and/or estate, residents declared partially disabled and those residents not subject to a legal declaration of incompetency at all, all of whom are represented by name as plaintiffs in this action. Duffy and the opinion in this case deal

exclusively with residents not subject to a legal declaration of incompetency, and the manner of service on them.

The result is impermissible discretion allowed to state officials in determining whether to collect from and the manner of service upon those residents not mentioned in the statute. There is nothing in the statute which can offer guidance. Collection from residents not mentioned in the statute should occur under the clear guidance of the Legislature, as evidenced by its statutory command in RCW 72.33.670 (1981), not at the whim or desire of state officials absent statutory methods.

To explain the dangers inherent in the present situation, an analogy can be drawn to cases dealing with the right of freedom of expression under the first amendment to the Constitution. The Supreme Court of the United States has consistently held statutes unconstitutional which permit public

officials to issue or withhold permits for parades, refuse to permit leafleting, and limit other forms of expression, based upon the official's discretion, where no clear guidelines exist in the statute. See Lovell v. Griffin, 303 U.S. 444 (1938); Staub v. Baxley, 355 U.S. 313 (1958). The court has recognized the dangers in making the exercise of freedom of speech "contingent upon the uncontrolled will of an official." Staub, at 322.

In view of the importance of the right involved here, the right to notice and opportunity to be heard before deprivation of property, the same reasoning is applicable. As mentioned above, there is no guidance in the statute as to collection from residents not expressly mentioned in the statute. Collection from residents with only a guardian of the person, or residents who have actual but non-judicially declared incompetency, is clearly

contingent upon the uncontrolled will of the state officials. The possibility of the arbitrary exercise of power must be coupled with the inherent vagueness of the statute to rule it inoperable as to residents who are not designated to be served notice by the statute.

In criminal law concepts, another analogy is pertinent. It is a longstanding principle of constitutional law that criminal statutes which are facially vague, such that adequate notice is not provided "to a person of ordinary intelligence that his contemplated conduct is illegal," Buckley v. Valeo, 424 U.S. 1 (1976), are unconstitutional. The vagueness doctrine has been extended beyond the area of criminal law and a "state statute must meet the challenge that it is unconstitutionally vague whether it is labeled penal or not." Giaccio v. Penn, 382 U.S. 399 (1966).

RCW 72.33.670 (1981) goes beyond mere vagueness. The statute makes no mention of service upon residents with only a guardian of the person or legally incompetent residents without guardians. There is certainly no warning in the statute to those residents of the state's procedures against them, and the statute must be ruled unconstitutional on grounds of vagueness.

IV. If RCW 72.33.670 (1981) Is Invalid on Either Due Process or Equal Protection Grounds, the Statute Violates RCW 49.60.030 (1981), the Washington Anti-Discrimination Law

The Supreme Court of Washington erroneously concluded that RCW 72.33.670 (1981) did not violate RCW 49.60.030 (1981), the Washington Anti-Discrimination Law. If the statute is found unconstitutional due to violation of either the due process clause or equal protection clause, allowing continued collection from some residents, but not others solely based upon

mental incompetency, the result is discrimination on the basis of mental handicap.

RCW 49.60.030(1) provides:

> The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical handicap is recognized as and declared to be a civil right.

The Washington Supreme Court concluded that the classification resulting from its decision "is based upon the presence or absence of legal incompetency," (App. A, p. A-10). There is little difference between a statute based upon legal incompetency or mental handicap, which RCW 49.60.030(1) (1981) prohibits. One simply results in the other and, thus, the court's own reasoning acknowledges that the statute is based upon impermissible classification.

Since the Washington courts failed to require conformance to constitutional mandates, it falls to the Supreme Court of the United States to do so. A ruling by

the Supreme Court of the United States that RCW 72.33.670 (1981) is unconstitutional, due to the improper service and appeal provisions under the due process clause of the fourteenth amendment, would mean that no collection could occur from adult residents not subject to a legal declaration of disability. Collection from residents who are subject to a legal declaration of disability would constitute collection based upon a mental or physical handicap. This would violate RCW 49.60.-030(1) (1981).

Alternatively, the court could rule that RCW 72.33.670 (1981) is unconstitutional under the equal protection clause, because it permits collection from residents subject to a guardianship of the estate while omitting, due to lack of proper service, collection from similarly situated residents, without such specific guardianships. If so, this would mean

collection violated RCW 49.60.030(1) (1981), as again, it would be based on mental handicap.

In either case, RCW 49.60.030(1) (1981) would be violated, as some residents would be discriminated against. The petitioners should then be allowed, under RCW 49.60.030(2) (1981), to "recover the actual damages sustained by him . . . together with the costs of suit, including reasonable attorneys' fees . . ."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Washington.

DATED this 25th day of October, 1982.

Respectfully submitted,

SWEET, DUSSAULT, NEFF &
GIBBS, P.S.
By: WILLIAM L. E. DUSSAULT
Attorneys for Petitioners